DEC 11 1973
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, ET AL.,
Appellants,

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

PETITION FOR REHEARING

WILLIAM J. LEGG, of
ANDREWS, MOSBURG, DAVIS, ELAM,
LEGG & BIXLER
1800 United Founders Tower
Oklahoma City, Oklahoma 73112
Attorneys for Appellants

December, 1973

UTTERBACK TYPESETTING CO., 819 W. CALIF. OKLAHOMA CITY. PH. 235-0030

TABLE OF CONTENTS

	PAGE
Petition for Rehearing	1
Brief and Argument	2
A. Appellants properly preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to Appellants' mineral rights claim	2
B. The Appellants, under state law, are not independently barred by the statute of limitations, irrespective of the constitutional adequacy of the tax-sale notice provisions	6
Conclusion	9
Certificate of Good Faith	9

Certificate of Service follows petition.

TABLE OF AUTHORITIES

STATUTES:

12 Okla. Stat. 1961 (1969 Supp.) §990 — 3

COURT RULES:

Rule 6 of the Rules of the Supreme Court of Oklahoma for Perfecting Appeals in Civil Cases — 3

In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, JAN PASCHAL HARDEN, JOHN N. PASCHALL, JR., THE FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, as Executor of the Estate of H. Grady Ross, Deceased, and ZELDA DANNA PASCHALL,

Appellants,

VERSUS

CHRISTIE-STEWART, INC., a corporation, R. W. GARRETT and R. H. VAUGHN,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR REHEARING

The Opinion of the Court of November 19, 1973, vacates the judgment of the Supreme Court of Oklahoma and remands the case to that Court to consider whether the Appellants preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to Appellants' mineral rights claim, and if so, whether, under state law, the statute of limitations independently

bars Appellants' claim, irrespective of the constitutional adequacy of the tax-sale notice provisions.

By reason of certain documents contained in the case record not previously called to this Court's attention, Appellants respectfully pray for a rehearing and reconsideration of the above determinations, and a decision of the rights of the parties on the basis of the constitutional issue solely presented by this appeal; *i.e.*, whether Appellants' predecessors were afforded notice of the taking of their property in compliance with the Due Process Clause of the Constitution of the United States.

BRIEF AND ARGUMENT

A. Appellants properly preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to Appellants' mineral rights claim.

In the Journal Entry of Judgment of October 27, 1969 (Jurisdictional Statement, App. B, p. xv), the trial court found, ordered and adjudged, *inter alia*, as follows:

> "(2). The Court Further Finds, Orders, Adjudges and Decrees that from the date of recording of said resale tax deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in the open, continuous, visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants, are further forever barred and precluded by the statute of limitations from seeking to assert the invalidity of said resale tax deed, as provided by 12 O.S. 1961, Sec. 93 (3) and (6)."

From that adjudication, an appeal was filed in the Supreme Court of Oklahoma in accordance with statutory procedure which necessitated the filing of a Petition in Error in the Supreme Court of Oklahoma, done on December 2, 1969. Notice of the appeal and designation of the record was filed in the trial court, and opposing parties were mailed a copy thereof, on December 9, 1969. The applicable statute authorizing this method of appeal is 12 Okla. Stat. 1961 (1969 Supp.) §990 and Rule 4 of the Supreme Court of Oklahoma. Rule 6 states: "On compliance with Rule 4, the appeal shall stand perfected."

The Petition in Error filed by Appellants in the Supreme Court of Oklahoma contains the following averment of error:

> "4. The lower court erred in finding and adjudicating that Defendants in Error R. W. Garrett and R. H. Vaughn have been in the possession of the oil, gas and other mineral rights of these Plaintiffs in Error in and under the above described land, from and after the recording of the above mentioned Resale tax deed.
>
> "5. The lower court erred in adjudicating that the possession asserted by Defendants in Error R. W. Garrett and R. H. Vaughn with respect to the above described land as a matter of law bars and precludes these Plaintiffs in Error from seeking to assert the invalidity of such Resale tax deed."

and in the prayer of such Petition in Error, the following appears:

> "WHEREFORE, Plaintiffs in Error pray that such judgments and orders may be reversed and set aside and that judgment may be rendered with regard to

each of the issues stated above in favor of Plaintiffs in Error as follows:

"(c) That Defendants in Error R. W. Garrett and R. H. Vaughn have never been in possession, either actual or constructive, of the oil and gas and other minerals underlying the above described land;

"(d) That the possession asserted by Defendants in Error R. W. Garrett and R. H. Vaughn with respect to the above described land as a matter of law does not bar or preclude Plaintiffs in Error from asserting the invalidity of the Resale tax deed above mentioned, or any of their respective rights in and to the oil and gas and other minerals in and under such land."

The Brief of Plaintiffs in Error filed on appeal in the State court, contained, on page 5, the following paragraph with regard to the possession which might be asserted for purposes of the statute of limitation:

"It is the testimony in this case that the tax sale purchasers at the Resale of 1956 filed their deed and took possession of the surface of the land through a tenant, but they made no attempt to take possession of the minerals thereunder either by executing a lease or physically exploring for minerals under the land. This was the status until Christie-Stewart, Inc. prevailed upon them to execute the oil and gas lease of 1963. Thereafter, Christie-Stewart, Inc. also obtained an oil and gas lease from the Paschalls and Mr. Ross and this action was filed in 1965. It cannot be argued therefore that any possession of the minerals was obtained by the tax title claimants prior to this case coming to issue, since only the surface owner's name was included in the Resale publication notice and only the surface was actually possessed thereafter by the tax sale claimants."

The Defendants in Error failed to challenge that proposition in their Brief filed in the State appellate court and made only the following statement on page 7 with regard thereto:

> "It should also be noted that counsel's argument that such Resale Tax Laws now in effect are violative of the Due Process Clause of the Constitution . . . would hold invalid the applicable Statute of Limitations with reference to such Tax Deeds (12 O.S.A. 93) . . ."

The import of that statement is not to assert the defense of the statute of limitation but is a challenge to the Due Process argument as affecting the Oklahoma statute of limitation.

It can be clearly seen from the foregoing that Appellants at every point in the appeal "preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to their mineral rights claim" and that it was the Appellees who failed to take up the matter and assert the bar. The Petition in Error, the Brief of Plaintiffs in Error, and the Brief of Defendants in Error, all filed in the Oklahoma appellate courts, are a part of the record forwarded to, and now on file in, the Supreme Court of the United States, to which the Court's attention is invited.

B. The Appellants, under state law, are not independently barred by the statute of limitations, irrespective of the constitutional adequacy of the tax-sale notice provisions.

With regard to the question of whether the Supreme Court of the United States should itself give weight to the applicability of the statute of limitations, we invite the Court's attention to the treatment of this matter commencing at (2) on page 8 of the Reply Brief of Appellants filed herein in September, 1973, and continuing to the bottom paragraph on page 13. The claim that the judgment against Appellants failed to provide equal protection of the laws was first made in the Petition in Error, paragraph (b), filed when the case was originally appealed from the trial court's judgment. It was made again in the Response to Motion to Dismiss and/or Affirm, page 4, filed by Appellants in March, 1973. It was again made and argued in both the Brief and Reply Brief of Appellants filed herein.

It should be noted that the Appellants challenged the applicability of the statute of limitations at every point of the state appellate procedure as indicated above. The Oklahoma Court of Appeals was presented a Petition in Error and a Brief of Plaintiffs in Error that raised the issue, but the court in its opinion dealt only with the constitutional issue and reversed the trial court with respect to the mineral rights, thus granting judgment to Appellants. At that point, Appellees filed a Petition for Rehearing on December 16, 1971, in the Oklahoma Court of Appeals, specifically raising the question of the applicability of the statute of limitations:

> "(a) That the Court failed to apply the provisions of Title 12, Oklahoma Statutes Section 93(3), which

> prohibits the bringing of an action for the recovery of oil property sold for taxes, within five (5) years after the date of the recording of the Tax Deed."

That Petition was denied by the Oklahoma Court of Appeals on February 1, 1972. From this action it is clear that the Oklahoma Court of Appeals had before it the question of the applicability of the statute of limitations and specifically ruled against it, leaving stand its opinion dealing exclusively with the constitutional issue of Due Process.

Appellees then filed their Petition for Certiorari "for the reasons stated in the Petition for Rehearing to the Court of Appeals." It is thereby conclusively shown of record that the Oklahoma Supreme Court had before it the question of whether the statute of limitations applied. Instead of deciding the case on that basis, the opinion of the Oklahoma Supreme Court dealt exclusively with the constitutional issue of Due Process, without one word concerning the statute of limitations.

Upon the decision of the case by the Oklahoma Supreme Court, Appellants filed their Jurisdictional Statement here in December, 1972, treating only of the one issue on which the Oklahoma Supreme Court decision rested. If the question of the applicability of the statute of limitations had been important to Appellees, their Motion to Dismiss and/or Affirm filed in February, 1973, should have concentrated on that proposition, even though neither the Oklahoma Court of Appeals nor the Supreme Court of Oklahoma considered the statute of limitations of sufficient applicability to comment thereon. Instead, Appellees' Motion to Dismiss and/or Affirm deals only with the constitutional

issue of Due Process. Appellants' Reply to such Motion likewise dealt only with the constitutional issue. The above mentioned pleadings and other filings are all contained in the record forwarded to, and now on file in, the Supreme Court of the United States, to which the Court's attention is invited.

It is therefore clear not only that the Oklahoma Court of Appeals and the Supreme Court of Oklahoma had before them the question of the applicability of the statute of limitations and refrained from basing their decisions thereon, but also that the Appellees refrained from basing their case upon that proposition. That was the posture of the case when probable jurisdiction was noted here on April 2, 1973. The only issue facing the Supreme Court of the United States, the only issue deemed sufficiently important to comment upon by the two lower appellate courts and the parties to the appeal here, was the ultimate decision quieting title to the mineral rights in Appellees and rejecting Appellants' federal constitutional claim. The lower judgment rests only on that rejection. An adjudication here on that issue would therefore not be advisory, but on the contrary would be fully dispositive of the case since there is no other issue before this Court or ground upon which the lower judgment rests.

CONCLUSION

Appellants respectfully call the Court's attention to the documents referred to above, contained in the record filed herein, and urge the Court to reconsider its order made in its opinion of November 19, 1973, and to decide the case on the sole issue facing the Court and upon which the lower appellate courts' decisions were made, that being the constitutional claims of failure of due process and denial of equal protection of the law.

Respectfully submitted,

WILLIAM J. LEGG, of
ANDREWS, MOSBURG, DAVIS, ELAM,
LEGG & BIXLER
1800 United Founders Tower
Oklahoma City, Oklahoma 73112

Attorneys for Appellants

December, 1973

CERTIFICATE OF GOOD FAITH

William J. Legg does hereby certify that the foregoing Petition for Rehearing is presented in good faith upon the grounds stated therein and not for delay.

William J. Legg

CERTIFICATE OF SERVICE

I hereby certify that the following, who are all of th parties required by law to be served in the above cas were this day mailed three copies of the foregoing Petitio for Rehearing, postage prepaid:

Elliott, Woodard & Rolston
Attention: Joe S. Rolston III
Suite 300, Local Federal Building
Oklahoma City, Oklahoma 73102

T. H. Williams, Esq.
105 West Second Street
Wewoka, Oklahoma 74884

Richard S. Roberts, Esq.
P. O. Box 876
Wewoka, Oklahoma 74884

George Verity, Esq.
First National Building
Oklahoma City, Oklahoma 73102

Jack Highley, Esq.
Hightower Building
Oklahoma City, Oklahoma 73102

Dated this ..... day of December, 1973.

.....

William J. Legg